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IN THE

SUPREME COURT OF LOUISIANA

October Term, 1962

No. 1086

M. A. HOLAHAN, TRUSTEE,
Petitioner,

versus

RUSSELL JACKSON and FRANCIS C. ROGERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Plaintiff-appellant petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on March 5, 1963.

OPINIONS BELOW

The United States District Court for the District of Arizona, Phoenix Division, did not write an opinion in rendering its judgment, and the opinion of the Court of Appeals is not reported, for the United States Court of Appeals for the Ninth Circuit concluded that the publishing of the opinion in the law reports would serve no public purpose, and so directed the Clerk of Court. The opinion of the United States Court of Appeals for the Ninth Circuit is appended hereto as App. A. The Court of Appeals in deny-

ing the petition for rehearing, modified its original opinion of March 5, 1963, and said modification is appended hereto as App. B.

JURISDICTION

The decree of the Court of Appeals was rendered and entered on March 5, 1963, and the order denying the petition for rehearing was entered without opinion on April 8, 1963. The Court of Appeals by order dated April 10, 1963, stayed the mandate of the Court until May 10, 1963, to allow your petitioner to petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is it the accepted and usual course of judicial procedure for a Court of Appeals to render an opinion assuming a familiarity with the record with the result being that appellant is deprived of his full appellate rights?

2. Is it the accepted and usual course for a Court of Appeals to accept as correct the conclusions of a Trial Court as distinguished from findings of fact.

3. Is a trustee in bankruptcy bound by the acts of a bankrupt corporation that result in creditors being illegally allowed to rateably participate in its assets?

4. Can a Court of Appeals assume that a Trial Court accepted certain testimony and rejected testimony or evi-

dence to the contrary where the Trial Court has not so found or stated?

5. Can a Court of Appeals fail to pass on an assignment or specification of error, and at the same time consider the evidence objected to in affirming the decision of the Trial Court?

6. Where a party has not made a contention in the Trial Court and the Trial Court has not used this contention in reaching its decision, can the Court of Appeals create a contention in affirming the decision of the Trial Court?

7. Is a Court free as a matter of law to hold that involuntary bankruptcy proceedings legally instituted were instituted to thwart the efforts of the bankrupt corporation from rightfully disposing of its assets?

8. Where a Trial Court has concluded that no agency exists, can a Court of Appeals in affirming the decision of the Trial Court state that the Trial Court could conclude that there was no agency?

9. Where testimony introduced by one party creates a conflict and the Trial Court has not resolved the conflict, can the Court of Appeals, admitting that there was a conflict, resolve the same?

10. Can an illegal transfer over and above a contractual obligation of a bankrupt corporation constitute a fair consideration under 11 U.S.C. 107(d)(1)(e)?

11. Is it not the rule that the burden of proof is upon the litigant who possesses the peculiar knowledge of the facts?

STATUTES INVOLVED

Title 11, United States Code Annotated, Section 96, provides in pertinent part:

> "a. (1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."
>
> "b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent."

Title 11, United States Code Annotated, Section 107, provides in pertinent part:

> "d. (1)(e) consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent

therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained."

"(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent. . . . (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors."

"(6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this Act, which is fraudulent under this subdivision against creditors of such debtor having claims provable under this Act, shall be null and void against the trustee, except as to a bonafide purchaser, lienor, or obligee for a present fair equivalent value: . . ."

STATEMENT OF THE CASE

Plaintiff-appellant, M. A. Holahan, is the duly appointed and qualified Trustee of the bankrupt estate of GULF

SECURITIES OF LOUISIANA, INC. (hereinafter referred to as the 'bankrupt'), presently under administration in the U. S. District Court for the Eastern District of Louisiana. It is entitled "*Eugene H. Dietzgen et al versus Gulf Securities of Louisiana, Inc.*" and bears Number 8951 of the Bankruptcy Docket of the United States District Court for the Eastern District of Louisiana, New Orleans Division.

The defendants-appellees are Russell Jackson and Francis C. Rogers, both residents and citizens of the State of Arizona.

This proceeding was instituted in the U. S. District Court for the District of Arizona by the plaintiff-appellant to set aside a transfer of $100,000 cash made to the defendants-appellees by the bankrupt corporation on July 6, 1957. The proceeding was instituted under the provisions of 11 U.S.C. 96, and 11 U.S.C. 107. The U. S. District Court for the District of Arizona had jurisdiction of this controversy regardless of the other jurisdictional requisites under the provisions of 11 U.S.C. 46, 96 (b) and 107 (e).

Plaintiff-appellant maintained that the transfer of July 16, 1957, of the $100,000 cash to the defendants-appellees represented a transfer made with the actual intent to hinder, delay or defraud the existing creditors of the bankrupt, all in accordance with 11 U.S.C. 107(d).

It is also maintained in the complaint that the transfer of the $100,000 cash on July 16, 1957, represented a voidable preference within the meaning of 11 U.S.C. 96.

Alternatively, plaintiff-appellant urged that there was

no consideration passing to the bankrupt for the transfer of at least $26,000 of the payment made on July 16, 1957, and, therefore, this amounted to a fraudulent transfer within the meaning of 11 U.S.C. 107(d).

Defendants-appellees filed individual answers. However, both claimed the $100,000 received by them on July 16, 1957, was in repayment of sums previously advanced by a joint venture known as "Jackson-Rogers" to the bankrupt, as per agreement of October 19, 1956.

Defendants-appellees also alleged that they were secured creditors by virtue of an assignment executed by the bankrupt and delivered to Jackson-Rogers joint venture dated November 2, 1956.

Defendants-appellees in the course of their answers denied that the bankrupt was insolvent on July 16, 1957, or that either defendant had knowledge of or reasonable cause to believe that the bankrupt was insolvent.

Defendant-appellee Rogers filed an amended answer, alleging affirmatively that the $100,000 paid to Jackson-Rogers on July 16, 1957, was paid as per written notice received by Jackson-Rogers from the bankrupt on June 11, 1957.

Defendant-appellee Rogers also affirmatively alleged on information and belief that the assets coming into the hands of plaintiff-appellant upon his appointment and qualification were more than sufficient to pay in full the liabilities of the bankrupt and that any depreciation or decrease of said assets was occasioned by the lack of

diligence, default and neglect of duty on the part of plaintiff-appellant.

The bankrupt is a corporation organized under the laws of the State of Louisiana, having its principal domicile in the Parish of Orleans, City of New Orleans, State of Louisiana. In addition, it was also authorized to do business in the State of Florida.

As of July 16, 1957, the bankrupt had three officers; namely President, Vice-President and Secretary-Treasurer. The officers as of July 16, 1957, were M. R. Fletcher, President, A. L. Busby, Vice-President and Herman C. Haack, Secretary-Treasurer.

The bankrupt had a board of directors consisting of four members, the three men hereinabove referred to, and a fourth member, Eugene G. Stevens. The officers of the bankrupt acted under the direction and control of this board of directors.

The bankrupt corporation was capitalized for $6,000 and the stock in the corporation was owned as follows:

M. R. Fletcher	40%
A. L. Busby	40%
Herman C. Haack	10%
Eugene G. Stevens	10%

The bankrupt was organized primarily to assist in the promotion of municipal improvement, by acting as fiscal agents for municipalities and in furnishing other necessary services in connection with municipal bond issues to be

used in making municipal improvements. Some of the other services furnished by the bankrupt were feasibility reports, necessary legal services, engineering services, as well as architectural services needed in connection with a municipal improvement.

The bankrupt, according to the testimony, entered into a contract with the City of Panama City, Florida, on November 4, 1956 (Plaintiff Exhibit 41), whereby it agreed to furnish certain services to the City of Panama City, in connection with what was eventually known as Waterfront Improvement Project. It was anticipated that the City would build two marinas, a municipal auditorium and a city hall. Under this contract, the bankrupt was to be compensated for these services by the City paying to it 8% of the face value of the bond issue, contingent, however, upon the bonds being sold. The fee was to be payable to the bankrupt as follows: 7% or $490,000.00 upon the bonds being sold to the bond house, and the remaining 1% or $70,000, to be paid after the bankrupt had finished the consulting engineering services for the project and when the project was completed and accepted by the City of Panama City. The contemplated bond issue was $7,000,000.

The bonds for the Waterfront Improvement Project were sold on July 11, 1957, at which time the bankrupt was entitled to receive $490,000 of its fee for the services that it had rendered prior to the sale of these bonds. The $490,000 was received by the bankrupt from the City of Panama City on July 16, 1957.

The officers hereinabove referred to, remained as the officers of the bankrupt until August 13, 1957, when at

a meeting of the stockholders, M. R. Fletcher was removed as President and Herman C. Haack was elected President and Treasurer, A. L. Busby was re-elected Vice-President and Eugene G. Stevens was elected Secretary (see Plaintiff Exhibit 26). The reason for Mr. Fletcher's removal as President was given by Mr. Haack (Plaintiff Exhibit 51, page 9), wherein he stated that the bankrupt, acting through Mr. Fletcher as President, legally instituted suits against Mr. Busby, Mr. Stevens and himself for the return of monies they had expended out of the $490,000; that he should be removed as President. At the same stockholders' meeting of the bankrupt held on August 13, 1957, (Plaintiff Exhibit 26), Messrs. Busby, Haack and Stevens also removed James H. Drury, Esq., the regular attorney for the bankrupt, and authorized the President to dismiss the suits presently pending by the corporation against Messrs. Busby, Haack and Stevens.

The bankrupt had existing bank accounts in the Whitney National Bank in New Orleans and in the Union Planters Bank of Memphis, Tennessee. On July 6, 1957, a board of directors' meeting of the bankrupt was allegedly held in the City of Panama City, Florida, allegedly with Messrs. Busby, Haack and Stevens present. There was no notification that this meeting was being called, and consequently M. R. Fletcher, as President, was not notified that such a meeting was being held. Two resolutions were adopted at this secret meeting of the board of directors held on July 6, 1957; namely, one authorizing A. L. Busby to accept payment of the $490,000 from the City of Panama City and to execute a release to the City of Panama City for the payment thereof. Additionally, A. L. Busby was authorized to open a bank account in the Commercial Bank in Panama

City and deposit the $490,000 check therein. A copy of this resolution of July 6, 1957, was introduced and marked for identification as Plaintiff Exhibit 48. It was admitted by Messrs. Busby and Haack that no effort was made whatsoever to notify M. R. Fletcher that such a meeting was being held on July 6, 1957, and that no effort was made between July 6 and July 20, 1957, to let M. R. Fletcher know that such a meeting had been held.

The $490,000 check was received by A. L. Busby on behalf of the bankrupt corporation and deposited on July 16, 1957, to the newly opened bank account of the bankrupt corporation in the Commercial Bank in Panama City, Florida. Immediately upon depositing the check, A. L. Busby drew a check in the amount of $355,100 payable to the Commercial Bank in Panama City, and a series of checks amounting to $98,892.23 payable to certain individuals and companies. A total of $453,992.23 was immediately drawn from the original deposit of $490,000. This was all done on July 16, 1957, within the matter of an hour or two from the deposit.

The check in the amount of $355,100 payable to Commercial Bank of Panama City, was used to purchase a number of cashiers' checks, payable as follows:

Mercer P. Spear and John Mitchell	$ 43,700.00
B. O. Vannort Engineers, Inc	92,000.00
JACKSON-ROGERS	100,000.00
W. H. Sapp	2,500.00
Philip A. Roll	56,000.00
H. C. Haack	37,900.00
Cash (clerical work)	1,000.00

Cash (public relations)	2,000.00
Cash (A. L. Busby expenses)	12,000.00
Cash (A. L. Busby expenses)	8,000.00
Total	$355,100.00

The check payable to Philip A. Roll was actually a check for a Mr. H. Mack Lewis, the defendant in *Holahan v. Lewis* reported at 182 F. Supp. 473.

The $98,892.23 worth of checks were payable as follows:

A. L. Busby	$ 40,000.00
E. G. Stevens	37,900.00
Memphis Aero Corp	1,303.20
Bay National Bank	221.66
Dixie-Sherman Hotel	1,600.00
Southern Bell Tel. & Tel	1,570.37
B. O. Vannort Engineers, Inc.	15,297.00
Doerner, Rinehart, Stuart & Clammer	1,000.00
Total	$ 98,892.23

The checks set out above were all identified in a deposition of a Mr. Hugh A. Nelson marked for identification Plaintiff Exhibit 40.

Thereafter and on or about July 18, 1957, M. R. Fletcher had discovered that the check of $490,000 had been paid to the bankrupt corporation through A. L. Busby, and it was not until July 20, 1957 that M. R. Fletcher discovered that a meeting of the board had been held and that these disbursements had been made as set out above. At

this meeting in Memphis, Tennessee, between Messrs. Fletcher, Busby, Hauck and Stevens, the balance of the money was offered to Mr. Fletcher and he refused the same.

Thereafter, Mr. Fletcher notified the Commercial Bank in Panama City that the resolution adopted by the board on July 6, 1957, had been illegally adopted. (Plaintiff Exhibit 45). The bankrupt corporation, acting through H. R. Fletcher, its President, instituted individual suits against Messrs. Busby, Hauck and Stevens, based on the illegality of the meeting of July 6, 1957, and the illegal payments or disbursements made of July 16, 1957. The result of these suits as heretofore stated was that a stockholders' meeting was held on August 13, 1957, Mr. Fletcher was removed as President, James H. Dent removed as attorney for the bankrupt and the newly elected President, H. C. Hauck, was authorized to dismiss the three suits pending by the corporation against himself and Messrs. Busby and Stevens. (See Plaintiff Exhibit 26).

On August 16, 1957, an involuntary petition was filed by a group of creditors of the bankrupt, and filed in the U. S. District Court for the Eastern District of Louisiana, New Orleans Division. (See Plaintiff Exhibit 1). The basis of the involuntary petition was that the transfers made by the bankrupt, acting through Messrs. Busby, Hauck and Stevens, constituted acts of bankruptcy by it in that the transfers concealed, removed or permitted to be concealed and removed, the $453,992.23 on July 16, 1957, from the bankrupt's account, with the intent to hinder, delay or defraud its creditors. This action being based on the provisions contained in 11 U.S.C. 21(a)(1). One of the trans-

fers questioned was the $100,000 transfer to the defendants-appellees.

An answer was filed in behalf of the bankrupt, denying that it was insolvent on July 16, 1957, and denying that these transfers were made by it to conceal or remove these funds with intent to hinder, delay or defraud its creditors. (See Plaintiff Exhibit 4). On July 10, 1958, Honorable Herbert W. Christenberry, Sr., U. S. District Judge for the Eastern District of Louisiana, adjudged Gulf Securities of Louisiana, Inc. an involuntary bankrupt (Plaintiff Exhibit 2).

Plaintiff-appellant in Plaintiff Exhibits Nos. 1 and 5 presented his qualifications as trustee of the bankrupt estate of Gulf Securities of Louisiana, Inc., and his qualifications have not been put at issue herein.

Plaintiff-appellant's action is grounded basically on 11 U.S.C. 96, containing the definition of a preference and the rights of a trustee in bankruptcy to void a preference and 11 U.S.C. 107(d), containing the provisions of fraud and the rights of a trustee in bankruptcy to void certain transfers as a result of fraud in law and fraud in fact. The action of the plaintiff-appellant, in his capacity as trustee in bankruptcy, is aimed at voiding a transfer of $100,000 cash made to the defendants-appellees by the bankrupt acting through Messrs. Busby, Haack and Stevens on July 16, 1957, some thirty days prior to the involuntary petition being filed against the bankrupt.

Defendants-appellees affirmatively alleged that the $100,000 was transferred to them on July 16, 1957, in re-

payment of sums advanced by them to the bankrupt corporation under that certain agreement dated October 19, 1956, entered into by and between Jackson-Rogers, the bankrupt, and A. L. Busby (Plaintiff Exhibit 9).

The alleged fraud is denied by the defendants-appellees, along with denials that the bankrupt was insolvent on July 16, 1957, or that defendants-appellees had any knowledge of or reasonable cause to believe that the bankrupt was insolvent or that A. L. Busby was a member or participant in Jackson-Rogers, or that A. L. Busby was at any time their agent in the transaction.

In addition, it is affirmatively alleged that the defendants-appellees (Jackson-Rogers) were secured creditors of the bankrupt by virtue of that assignment executed and delivered by the bankrupt to Jackson-Rogers, dated November 2, 1956 (Defendant Exhibit A).

Defendant-appellee Rogers affirmatively alleged that upon the adjudication on July 16, 1958 (Plaintiff Exhibit 2) there were enough assets coming into the possession and control of the plaintiff-appellant with which to pay all of the obligations of the bankrupt corporation and that if they decreased or depreciated in value, they did so as a result of the negligence and the fault of the plaintiff-appellant.

The question of what sum was actually advanced by Jackson-Rogers to the bankrupt was put at issue by the plaintiff-appellant. The records of the bankrupt corporation carried an account entitled "Jackson-Rogers" and this account showed that the sum of $28,500 was allegedly advanced by Jackson-Rogers. The witness, H. C. Haack,

President and Secretary of the bankrupt corporation, who kept the financial records of the bankrupt corporation, stated that he assumed that it was Jackson-Rogers' money coming into the corporation and so recorded it. The witness, M. R. Fletcher, who was President of the bankrupt corporation until removed on August 13, 1957, stated he was not able to determine how much was advanced by Jackson-Rogers and that Herman C. Haack likewise informed him that he did not know what sum was actually advanced.

Subpoenas were directed to the defendants-appellees to produce at the trial of this matter any and all documents or writings or checks evidencing amounts of monies advanced or loaned to the bankrupt corporation by Jackson-Rogers, and Plaintiff Exhibits 57, 58, 60 and 63 were produced, showing that the bankrupt was advanced $7,700.00.

Defendant-appellee Rogers stated that Del E. Webb Construction Company advanced $25,000 for the account of Jackson-Rogers to the bankrupt; however, no member of the firm Del E. Webb Construction Company was produced to substantiate this statement and defendant-appellee Rogers admitted that he had no personal knowledge as to whether the $25,000 was actually advanced or not. Defendant Exhibit G contains the provision that the $25,000 was to be advanced by Del E. Webb Construction Company at such time as Jackson-Rogers would have advanced to the bankrupt not less than $25,000, and A. L. Busby had advanced to the bankrupt, through Jackson-Rogers, the sum of $50,000.

Defendant-appellee Rogers further testified in his deposi-

tion of October 25, 1960 (Plaintiff Exhibit 55, page 54) that $85,000 was advanced; the first morning of the trial Rogers testified that $87,500 was advanced (R. 63); and on the last day of the trial Rogers testified that $89,075 was advanced. (R. 425).

The question of whether the bankrupt was insolvent on July 16, 1957, was put at issue by the denials of insolvency by defendants-appellees, but no evidence was produced in behalf of the defendants-appellees.

The record discloses that the bankrupt from October 1, 1955 through June 30, 1957, had the total of $77.29 of income (R. 131) and it had subsisted on borrowed funds since shortly after its incorporation. The deficit as of June 30, 1957, was $382,618.76, and since the financial records of the bankrupt corporation were kept on a cash basis, they did not disclose, as of June 30, 1957, all indebtedness due by it.

Defendants-appellees asserted affirmatively that they were secured creditors by virtue of the assignment dated November 2, 1956 (Defendant Exhibit A). This assignment was allegedly executed by the bankrupt corporation acting through A. L. Busby, and it assigned to Jackson-Rogers the entire proceeds from the Panama City-Gulf Securities contract (Plaintiff Exhibit 41).

Defendant Exhibit A, the assignment, was supposedly signed by A. L. Busby at Phoenix, Arizona, on November 2, 1956, but acknowledged before a Notary Public by A. L. Busby in New Orleans, Louisiana, some three days later on November 5, 1956. A. L. Busby is the only witness and the member of the bankrupt corporation who stated

that the assignment was served on the City of Panama City through Mercer P. Spear, City Attorney, Herman C. Haack and M. R. Fletcher had no knowledge of the assignment, and Mercer P. Spear, the City Attorney, testified he had never seen the assignment.

It was asserted by plaintiff-appellant that A. L. Busby was a participant in the Jackson-Rogers joint venture and or was acting as an agent for Jackson-Rogers with the bankrupt; consequently his knowledge of the insolvency of the bankrupt was imputable to the defendants-appellees. It was admitted by the defendant-appellee Rogers and Busby that he had advanced certain monies to the bankrupt through Jackson-Rogers. Defendant Exhibit G, the agreement of November 2, 1956 executed by and between Jackson-Rogers and Del E. Webb Construction Company, stated that Busby was to advance $50,000 to the bankrupt through Jackson-Rogers. Busby, in his testimony, readily admitted knowledge of the insolvent condition of the bankrupt at the time that disbursements were made on July 16, 1957.

Defendant-appellee Rogers is charged with knowledge of the insolvency of the bankrupt as of July 16, 1957, because of his association with Busby and the various steps leading up Jackson-Rogers making the loan to the bankrupt. It was readily admitted that the bankrupt was in need of monies to finance the completion of the contract with the City of Panama City (Plaintiff Exhibit 41).

The issue of actual intent on the part of the bankrupt to hinder, delay or defraud its existing creditors is shown primarily through the circumstances surrounding the issu-

ance of the $490,000 check received from the City of Panama City and the actions of Busby, Haack and Stevens in holding the secret meeting of July 6, 1957, evidenced by the resolution of that date (Plaintiff Exhibit 48). It is to be noted here that neither defendant-appellee set up the affirmative defense afforded them under 11 U.S.C. 107 (d) (6); that is, a plea of good faith and giving of a present fair equivalent.

Defendant-appellee Rogers affirmatively pled that at the time plaintiff-appellant was appointed trustee, he took possession of assets that would have been enough to pay all of the existing creditors of the bankrupt and that if they had decreased or depreciated in value, they did so because of the negligence or default of the plaintiff-appellant.

The Court did not order plaintiff-appellant to file a reply, and a reply was not filed in his behalf.

Plaintiff-appellant under the provisions of 11 U.S.C. 47 and 48 filed an appeal to the United States Court of Appeals for the Ninth Circuit specifying 24 instances of errors in connection with the holding of the Trial Court.

The Court of Appeals for the Ninth Circuit, with no references to the record or exhibits, rendered an opinion affirming the judgment of the Trial Court.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals in this proceeding stated that they were assuming a familiarity with the record since their decision was based entirely on factual grounds and of in-

terest only to the litigants. This resulted in your petitioner being deprived of his full appellate rights, in that petitioner was unable to locate in the record references either to documentary evidence, pleadings or testimony referred to by the Court of Appeals.

An example is that the Court of Appeals stated that it was implicit in the Trial Court's findings that your petitioner failed to prove that the transfer was made without fair consideration. The findings of the Trial Court, which are nothing more than conclusions, are completely void of such an implication. In Finding No. 14 (R. 31), the Trial Court concluded that there was no fraud "actual, constructive or otherwise". However, it did not refer to the failure of your petitioner to prove that the transfer was made without a fair consideration. Fraud in law as distinguished from fraud in fact is composed of several factors, only one of which is lack of fair consideration (11 U.S.C. 107(d)(2)(a)).

It is also to be noted that 11 U.S.C. 107(d)(1)(e) adds the element of "good faith" to the definition of fair consideration. The Court of Appeals obviously did not consider this element in their determination that there was a fair consideration flowing from the respondents to the bankrupt corporation. The Court of Appeals accepted the figures of the respondents who had actually allowed Busby to pay himself back with their help even though Plaintiff Exhibit 9 does not contain a provision for a repayment to Busby by the bankrupt corporation.

Just as another example, the Court of Appeals in this case stated that the Trial Court could conclude "that per-

sons represented by appellees received $81,425." The Trial Court concluded without any specific finding (Finding No. 10, R. 30) that the appellees distributed and disbursed the whole $100,000 "to the several trustors or beneficiaries" represented by the appellees. The Court of Appeals in its opinion found that Arthur L. Busby was represented by these same appellees, yet found that Busby's contribution and reimbursement were legally and factually separable from those of persons represented by respondents.

On Page 3 of its opinion the Court of Appeals makes this statement:

> "The fact that Busby was repaid from the $100,000 transferred to appellees indicated that appellees acted as Busby's agent for this purpose;"

On Page 4 of its opinion the Court of Appeals states as follows:

> "(a) On this Record Busby's contribution and reimbursement were legally and factually separable from the contributions and reimbursement of persons represented by appellees, and might be excluded in determining whether the distribution of funds to the latter was supported by a fair consideration."

Another glaring example of the injustice done to your petitioner by the Court of Appeals failing to refer to the record in sustaining its statements, can be found in the fact that they held that the persons represented by the appellees received $81,425, represented by $72,500 of prin-

cipal, a payment of 10% on the principal, and a reimbursement of $2,675 as expenses. In the petition for rehearing your petitioner pointed out to the Court that this amounted to $82,425, and the Court of Appeals, again without making any references, stated that the figure of $2,675 be changed to $1,675, thereby making the figure of $81,425 mathematically correct. There is nowhere in this record that one can point out to your petitioner or to this Court that appellees were reimbursed $1,675 in expenses.

On Page 99 of the printed record respondent Rogers testified that $1,000 was paid to his company, the First of Arizona, as a refund on expenses. Respondent Rogers did not know what the $675 was for. Petitioner asks the Court to compare this testimony with the testimony of the respondent Rogers on Pages 425-426 and also with Defendant Exhibit R.

Again, if the Court of Appeals had followed the usual judicial procedure in writing its opinion, your petitioner would not have been deprived of his full appellate rights.

2. This Court's attention is directed to the alleged findings of fact as made by the Trial Court in this matter (R. 27 through R. 31). The so-called findings of fact in nearly every instance are merely conclusions, and it is submitted that it is not the accepted or usual course of appellate jurisdiction for a Court of Appeals to accept as correct the conclusions of a Trial Court as distinguished from findings of fact. This Very Court of Appeals in the case of *National Lead Co. v. Western Lead Products Co.*, 291 F. (2d) 447 held that it is not the proper function of an appellate court "to engage in a process of assuming basic findings of fact

upon which the conclusions of the District Court may have been reached, and then test those assumed that findings under the 'clearly erroneous' rule". This Court's attention is directed to the statement made many times by the Court of Appeals in this case, that the Trial Court could conclude, not that the Trial Court did find.

Petitioner's counsel before the Court of Appeals complained of the alleged findings as not being in truth and in fact findings, but merely conclusions. The complaint was that your petitioner, as well as the Court, was at a distinct disadvantage since the Trial Court did not make any findings of fact as distinguished from conclusions. The result was that your petitioner before the Court of Appeals was unable to determine upon what the Trial Court based its conclusions, and this Court of Appeals, who has many times held and remanded similar cases, accepted the conclusions of the Trial Court as alleged findings and allowed them the presumption of the clearly erroneous rule.

3. This Court and other Courts of Appeal have uniformly held that a Trustee is not bound by the acts of the bankrupt, whether the bankrupt be an individual or a corporation. Likewise, this Court and other Courts of Appeal have held that a Trustee is the guardian of a bankrupt estate, and one of his main duties is to see that one creditor or group of creditors are not to be unjustly enriched at the expense of the remaining creditors. *First National Bank vs. Staake*, 202 U. S. 141, 26 S. Ct. 580; *Chorost vs. Grand Rapids Factory Show Room*, 77 F. Supp. 276, affirmed 172 F. (2d) 327; *Kindom Uranium Corp. vs. Vance*, 269 F. (2d) 104; *Dudley vs. Dickie*, 281 F. (2d) 360; *In Re Toms*, 101 F. (2d) 617.

The Court of Appeals in this matter, however, in holding that the Trial Court was justified in finding that the $100,000 in cash was transferred to the respondents without actual intent to defraud, hinder or delay the creditors, charged the Trustee, your petitioner, with the illegal acts of the bankrupt corporation, acting through three members of the Board of Directors, namely, Arthur L. Busby, Herman C. Haack and Eugene G. Stevens. The Trial Court did conclude that there was no actual intent to hinder, delay or defraud the creditors; however, it made no findings of fact in connection therewith, and the Court of Appeals had nothing upon which to base the statement that the Trial Court was free in this instance to accept the testimony of Busby and Haack as against the testimony and documentary evidence introduced in behalf of your petitioner.

Likewise, contrary to the jurisprudence hereinabove referred to, it charged your petitioner with the acts of this bankrupt corporation which would in fact hinder and delay the creditors of the bankrupt corporation in making this transfer to the respondents herein. The witnesses, Busby and Haack, testified that their purpose in making the transfer was to prevent dissipation of the corporation assets by the fourth member of the Board of Directors; however, the Court failed to state that the bankrupt corporation continued in possession of its business under the control of Busby, Haack and Stevens, and approximately $550,000 of claims that were due and owing by the bankrupt corporation on July 16, 1957, were not paid as of the date of adjudication in bankruptcy on July 10, 1958. On July 16, 1957, the date of the transfer in question herein, Busby, Haack and Stevens secretly called a meeting of the Board of Di-

rectors of the bankrupt corporation and caused it to disburse within an hour's time, $453,992.83 out of $490,000 cash received that day. Busby and Haack may have stated their purpose in making the transfer to the respondents and to other persons on July 16, 1957, but the result of the bankrupt corporation's action on that day was that $550,000 worth of creditors were actually hindered, delayed and defrauded because these funds were placed beyond their reach.

Counsel for your petitioner could not determine from the findings, or alleged findings, of the Trial Court as to what weight it assigned to what testimony, since it merely made a conclusion. The Court of Appeals in its opinion, states that the Trial Court did not assign the weight which the Trustee assigned to the following excerpt from Busby's testimony, found on page 247 of the record:

> "Q. Mr. Busby, why did you choose to pay back to yourself through Jackson-Rogers?
>
> A. I wanted to be sure to get as much of the money as I could get, and this was one of the vehicles by which I could get my part of the money. I wanted to get my money out of it, and I thought that this was the way to do it."

Mr. A. L. Busby is an intelligent man, and from this testimony clearly stated his purpose. The money Busby is talking about is the $490,000 received on July 16, 1957.

4. The Court of Appeals throughout its opinion states that the Trial Court was free to accept certain testimony,

and states that the Trial Court could have concluded or could conclude. It is the position of your petitioner and the appellant herein that a Court of Appeals cannot assume that a Trial Court has accepted certain testimony unless the findings of the Trial Court are explicit enough to determine this.

As previously stated, and it must be repeated, the Trial Court herein, with the exception of a few findings, merely made conclusions, and not findings, which would support the Court of Appeals in the statements complained of herein.

5. The Court of Appeals in rendering its opinion herein constantly failed to pass upon assignments or specifications of error made by your petitioner before that Court, yet the same Court of Appeals considered the evidence objected to in rendering its opinion affirming the judgment of the Trial Court.

Contained in the printed record at page 443 is the statement of the points upon which your petitioner relied in presenting his case to the Court of Appeals. On page 449 of the printed record in Points 23 and 24, your petitioner objected to the Trial Court allowing in evidence Defendant Exhibit J, a document entitled 'Release of Claims'. This document is a release executed by your petitioner in his capacity as the Trustee of the bankrupt estate as per the authority of the United States Referee for the Eastern District of Louisiana. This Defendant Exhibit J was executed on December 22, 1959, and the transfer in question to the appellees, respondents herein, was made on July 16, 1957. At the time Defendant Exhibit J was executed, the bank-

rupt estate had been under administration some thirteen months.

The Court of Appeals in its opinion of March 5, 1963, stated as follows:

> "The Trustee's settlement with Busby expressly covered the funds which Busby received in the transaction to which this suit relates; there is no apparent reason why the Trustee should be permitted to hold both Busby and appellees responsible for receipt of the same funds."

This statement of the Court of Appeals obviously is referring to Defendant Exhibit J; yet it did not pass on petitioner's assignment or specification of error relating to the Trial Court's admission of this document.

The Trial Court, when requested by your petitioner to make a finding as to how much in principal the respondents herein advanced as a loan to the bankrupt corporation (see additional findings, R. 32 through R. 34), refused to make such a finding; yet the Court of Appeals in its opinion refers to a cash advance of $72,500. This statement was made by the Court of Appeals in spite of the fact that the principal respondent, Rogers, testified as to three sums advanced by them, namely, $85,000 (Plaintiff Exhibit 55, p. 54), $87,500 (R. 63), and finally the sum of $89,075 (R. 425). Was not the Trial Court in error in not making a finding as to how much in principal or cash was advanced by the respondents to the bankrupt corporation?

The issue of how much cash the respondents advanced

to the bankrupt corporation is most significant, if not the most significant issue in the case.

All records of the respondents were subpoenaed, and the only documents produced were checks totalling $7,700, payable to the bankrupt corporation (Plaintiff Exhibits 57, 58, 60 and 63), checks totalling $13,000 payable to Busby (Plaintiff Exhibits 62 and 64). Defendant Exhibit R shows $50,000 transferred from Busby's account to the bankrupt corporation's account; however, there is no evidence or testimony as to who put the $50,000 in Busby's account. There is in addition, Defendant Exhibit G, which states that Busby was to advance $50,000 to the bankrupt corporation through Jackson-Rogers, Jackson-Rogers was to advance $25,000, and $25,000 was to be advanced by Del E. Webb Construction Company after Busby and Jackson-Rogers had advanced their $75,000. These latter two instruments were introduced in evidence by the respondents herein.

Your petitioner also assigned as an error, the fact that the Trial Court concluded that the only members of the Jackson-Rogers joint venture were Russell Jackson and Francis C. Rogers. The Trial Court concluded this without making any finding of fact relating to this conclusion. The Court of Appeals without passing on that assignment of error, referred to testimony of Busby and the respondent Rogers to the effect that Busby was not a part of the joint venture. How can the Court of Appeals hold that Busby was or was not a party to the joint venture without having any knowledge upon which it could determine what fact, or facts, the Trial Court relied on in reaching this conclusion?

The Court of Appeals completely ignored other points made before it on appeal relating to the capacity and authority of Arthur L. Busby in executing some of the documents admitted in evidence and considered by the Court of Appeals in affirming the judgment of the Trial Court. One case in particular is Defendant Exhibit B, a letter dated June 11, 1957, referring to the fact that the bankrupt corporation will pay back to the respondents their principal, plus 10%, whereas Plaintiff Exhibit 9, the agreement, states that the bankrupt corporation will pay back to the respondents the principal advanced by them as a loan, plus interest at the New York prime rate from date of advance to date of payment.

The Court of Appeals likewise refused to pass on the assignment of error made by your petitioner relating to Point No. 21 (R. 449) as to whether respondents under their written agreement with the bankrupt corporation dated October 19, 1956, (Plaintiff Exhibit 9) performed all of their obligations to the bankrupt corporation. This was material to the issues involved, and the Court of Appeals in its opinion merely assumed that the respondents performed all of their obligations and even went so far as to say that the added monies received by the respondents over and above the New York prime rate were legal because the bankrupt corporation breached its contract with the respondents.

The entire opinion of the Court of Appeals refers to evidence and documents, some of which were objected to by your petitioner, and other issues not passed upon in assigned errors by your petitioner.

6. Your petitioner in presenting his appeal to the Court of Appeals pointed out that the respondents herein could not justify in any way the total transfer of $100,000 to themselves. The obvious reason is that the respondents in their pleadings affirmatively contended and pled that the $100,000 was paid to them by the bankrupt corporation in repayment of the sums that they had advanced to it under the agreement of October 19, 1956 (Plaintiff Exhibit 9). This document entitles the respondents to receive whatever principal they advanced, plus the New York prime rate of interest from date of advance until repayment. In the record it is established that the New York prime rate in existence at the time it was obvious that Del E. Webb Construction Company would not get the Panama City contract, was 4%. It is mathematically impossible for one to work out that the principal advanced by the respondents, plus 4% per annum interest from date of advance to date of repayment, amounts to $100,000.

The respondents never referred to in their pleadings and in any of their contentions before the Court of Appeals how much in principal they did advance, and the only evidence were the three amounts of $85,000, $87,500 and $89,075.

The Trial Court found that the $100,000 was in repayment of the sums to the respondents advanced by them under the agreement of October 19, 1956. In making this finding, if it is a finding and not a conclusion, the Trial Court tracked the answers filed in behalf of the respondents.

There is little doubt that this was the contention af-

firmatively of these respondents, that the money was received by them from the bankrupt in repayment under the agreement of October 19, 1956. The respondents so urged and argued before the Court of Appeals on October 11, 1962. In spite of this, the Court of Appeals states that there was evidence from which the Trial Court "could conclude that persons represented by appellees received $81,425 in return for an initial cash advance of $72,500, *and that the difference represented a payment of 10% on the principal and reimbursement of $2,675 in expenses.*"

The Court of Appeals also created the contention that Busby's contribution and reimbursement were legally and factually separable. This contention was never made by the respondents before the Trial Court or Court of Appeals. In fact, respondents throughout the Trial Court and Court of Appeals treated Busby's money as part of their contribution, since they maintained, as the Trial Court concluded, that the $100,000 was in repayment to the respondents for the sums advanced by the respondents under the agreement of October 19, 1956 (Plaintiff Exhibit 9). (See Finding No. 4, R. 27, and Answers of respondents).

Likewise, the contention that the bankrupt breached its contract with the respondents is a creation of the Court of Appeals. It is true that Busby testified that the added money was given for this reason, but respondent Rogers testified that they were always of the opinion that they would receive a 10% bonus from the bankrupt corporation. This latter statement by the respondent Rogers, however, was not substantiated by any testimony or documentary evidence.

It is submitted that a Court of Appeals cannot create a contention for a party when it was not urged before the Trial Court, found to be a fact by the Trial Court, or urged before the Court of Appeals itself.

It is also submitted that the Court of Appeals in creating this contention cannot refer to findings of the Trial Court that were never made.

7. This record contains a certified copy of the petition asking that Gulf Securities of Louisiana, Inc. be adjudged an involuntary bankrupt (Plaintiff Exhibit 3), and it also contains the answer of Gulf Securities, the bankrupt, (Plaintiff Exhibit 4). The United States District Court for the Eastern District of Louisiana, with Hon. Herbert W. Christenberry sitting without a jury, entered an order on July 10, 1958, adjudging Gulf Securities of Louisiana, Inc. an involuntary bankrupt.

Whereas the Trial Court did not make a finding to the effect that the efforts of the bankrupt to prevent dissipation of its assets were thwarted by the initiation of the bankruptcy proceedings, the Court of Appeals did say that the involuntary proceedings thwarted the efforts of the bankrupt corporation.

Counsel for petitioner was unable to locate any legal authority to sustain the Court of Appeals in making such a finding to the effect that the United States District Court allowed such an act to take place and did in fact adjudge Gulf Securities a bankrupt to thwart an effort to preserve for the benefit of all of the creditors, the assets of this bankrupt corporation. The Court of Appeals is in effect

holding that a United States District Court stated those creditors who initiated the proceedings to have Gulf Securities adjudged an involuntary bankrupt.

8. It was urged before the Trial Court and the Court of Appeals that Arthur L. Busby was a participant in the Jackson-Rogers venture and or was an agent of Jackson-Rogers in its dealings with the bankrupt corporation.

The Trial Court, while not making a finding, did conclude that the only parties to the joint venture were the respondents herein, and that Busby at all times acted as the agent for the respondents. It cannot be determined, however, upon what evidence, whether testimony or documentary, the Trial Court relied upon in reaching these conclusions. The Court of Appeals concluded that because Busby was repaid from the $100,000 transferred to the respondents indicated that the respondents acted as Busby's agent for this purpose. This contention was never made by the respondents before the Trial Court or the Court of Appeals.

The Court of Appeals correctly stated that the record shows that the respondents transferred funds intended for the bankrupt corporation to Busby, "but the Trial Court could conclude that this was adequately explained" referring to said testimony of the respondent Rogers and the evidence identifying Busby with the bankrupt corporation. The Court of Appeals again assumed that the Trial Court based its conclusion upon these facts.

The Trial Court did not make any finding that would illustrate what evidence it relied upon in concluding that

no agency existed or that Busby was "not a participant in the joint venture", and, hence, the Court of Appeals erred in stating that even though there was evidence of agency in the transfer of the funds, that the Trial Court could conclude that it was adequately explained by other testimony. There is documentary evidence (Defendant Exhibit G) that Busby was to advance through Jackson-Rogers, $50,000, and that Busby did advance $50,000 to the bankrupt corporation (Defendant Exhibit F). The evidence introduced showing distribution to these other persons is to be given no weight, since it is not inconceivable that Busby and Rogers received contributions from those persons; however, Busby and Rogers apparently failed to in turn advance these sums to the bankrupt corporation.

Petitioner further urges the Court to read Pages 58, 59 and 60 of Plaintiff Exhibit 55 which is respondent Roger's deposition of October 25, 1960.

One of the leading authorities on bankruptcy, *Remington on Bankruptcy* (5th Edit., Vol. 4, at page 264) states as follows:

> "Status as agent for the creditor is not necessarily destroyed by the fact that the person in question has also represented the debtor. In fact, knowledge which he has obtained only by reason of his service for the debtor can constitute reasonable cause, as agent for the creditor, to believe the debtor to be insolvent."

9. On the very material issue and assignment of error as to how much in principal the respondents advanced or

loaned to the bankrupt corporation, the Court of Appeals held that there was a conflict in the evidence. This conflict, of course, is not set out by the Court of Appeals, but obviously must be the fact that the respondent Rogers testified to three principal sums being advanced to the bankrupt corporation, namely, $85,000, $87,500 and $89,075. The Court of Appeals went on to say, without the benefit of any finding regarding this conflict, "The Trial Court could conclude", not that the Trial Court *did* conclude, or that there was evidence upon which the Trial Court *did* find, but rather the statements that there was evidence upon which the Trial Court *could* conclude.

10. Let us assume that respondents advanced $72,500, and that Defendant Exhibit B entitles them to a 10% bonus. The fact remains that respondents did receive from the bankrupt corporation, the sum of $20,250 over and above the figure of $79,750.

Is this the 'good faith' referred to in 11 U.S.C. 107 (d) (1) (e) that is necessary in a fair consideration?

Under Defendant Exhibit B respondents, and only respondents, were to receive a bonus of 10% on the principal that they advanced.

Respondent Rogers could not explain why he sat in the Commercial Bank in Panama City and took a $100,000 check. The only explanation could be that Busby was a participant in Jackson-Rogers.

Respondent Rogers and Busby disagreed as to how much Busby advanced and received. Rogers testified that Busby

put up $12,500, and received $15,575 cash, plus a note for $3,000 executed by Rogers for money that Rogers had taken out of the $100,000. Busby testified he put up a little over $15,000 and received that amount. Check No. 1 (Defendant Exhibit L) shows that Busby received $15,575. For the testimony of these two witnesses on this point see the printed record, pages 81 and 176.

If Busby testified to the truth, and Defendant Exhibit L is correct, Jackson-Rogers, as distinguished from Busby, received $84,425, and Busby, $15,575. This would at least entitle your petitioner to a judgment of $4,675, the difference between $84,425 and $79,750.

11. In the issue of how much the respondents advanced to the bankrupt corporation, your petitioner made every effort to place before the Court evidence which would establish the amount, and all the evidence pointed to the fact that the respondents possessed the peculiar knowledge of who advanced the money for their account, how much was advanced, and what the mechanics of each advance were.

Petitioner maintained that since respondents possessed this peculiar knowledge, they bore the burden of producing the necessary facts to sustain the amount of the advances. See *Campbell v. U. S.*, 81 S. Ct. 421, 427, 365 U. S. 97, and *Chicago Rys. Co.*, 175 F. (2d) 282, 290, cert. den. 70 S. Ct. 94.

For example, respondents admitted that they themselves did not advance the money, but that monies were advanced for their account. Both respondents testified that Del E.

Webb Construction Company was to advance $25,000, but neither knew or possessed any knowledge that this $25,000 was actually advanced by Del E. Webb. Del E. Webb personally and Thomas Heatherington, Vice-President of Del E. Webb Construction Company, were listed as witnesses for the respondents but were not produced at the trial. The obvious should be, since they were not produced, that their testimony would be against the interest of the respondents. These witnesses were residents of Phoenix, Arizona, where the trial of this matter was held, and it would have been a simple matter for respondents to produce them or the records of Del E. Webb Construction Company to show that the $25,000 had actually been advanced by Del E. Webb to the bankrupt corporation for the account of the respondents.

Likewise, respondent Rogers several times testified that the money advanced to the bankrupt corporation would be advanced by placing the same with the First National Bank of Arizona, with instructions to be sent to the bankrupt corporation. The records of the First National Bank of Arizona in Phoenix were never produced by the respondents.

Petitioner maintained before the Trial Court and the Court of Appeals that respondents failed in their burden of proof. Of course, the Trial Court did not make a finding as to how much cash the respondents actually advanced to the bankrupt corporation, and the Court of Appeals failed to pass on this particular issue.

CONCLUSION

The questions presented all involve important questions of federal law, and particularly the rights of a Trustee in Bankruptcy, and it is respectfully requested that the Court grant unto your petitioner a writ of certiorari.

PAUL J. THRIFFILEY, JR.
and
JOHN W. BRYAN
Attorneys for Petitioner
717 Richards Building
New Orleans 12, Louisiana

By: _____
JOHN W. BRYAN

CERTIFICATE

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared PAUL J. THRIFFILEY, JR., who, after being duly sworn, did depose and say:

That he is one of the attorneys for the petitioner in the foregoing Application and that he has caused to be served copies of the foregoing Application and accompanying Appendices on Messrs. Gust, Rosenfeld & Divelbess, Security Building, Phoenix Arizona, attorneys for respondent Russell Jackson, and Messrs. Perry & Perry, 222 West Osborn Road, Phoenix, Arizona, attorneys for respondent Francis C. Rogers, by placing same in the United States Mails, postage prepaid.

PAUL J. THRIFFILEY, JR.

Sworn to and subscribed before me this —— day of ————, 1963.

Notary Public

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Mar. 5, 1963

M. A. HOLAHAN, Trustee,
Appellant,

vs. No. 17,773

RUSSELL JACKSON and FRANCIS C. ROGERS,
Appellees.

Appeal from the United States District Court
for the District of Arizona

Before: JERTBERG, MERRILL and BROWNING, Circuit Judges

BROWNING, Circuit Judge:

This is an action by a trustee in bankruptcy to set aside a transfer of funds from the bankrupt corporation to the appellees. The trustee alleged alternatively that the transfer was: (1) void under 11 U.S.C.A. § 107 (d)(2)(d) and § 107 (d)(6); (2) voidable under 11 U.S.C.A. § 96 (a)(1) and § 96 (b); and (3) as to a portion of the funds, void under 11 U.S.C.A. § 107 (d)(2)(a) and § 107 (d)(6). The District Court decided adversely to the trustee on all three issues. We affirm. Since the grounds of our decision are wholly

factual and of interest only to the litigants, we state them in terms which assume a familiarity with the record.

1. *11 U.S.C.A. § 107 (d)(2)(d).*

The trial court was justified in finding that the funds were not transferred with actual intent to defraud, hinder, or delay creditors of the bankrupt.

The challenged transfer was conceived, authorized, and accomplished by Busby, Haack, and Stevens. Busby and Haack testified in detail as to the circumstances surrounding the transfer and the purpose for which it was made. Their testimony offered an answer to each of the questions raised by the trustee: the reason for Busby's guaranty; why Fletcher was not present on relevant occasions; the reason for disbursing the particular funds to the particular creditors; why a special account was opened in the particular bank; how the amount to be transferred was determined. They testified that their purpose in making the transfer was to prevent dissipation of the corporate assets by Fletcher and to preserve them for the benefit of all of the creditors, and that this purpose would have been accomplished except for the initiation of bankruptcy proceedings by Fletcher. The trial court was free to accept this testimony and reject the evidence to the contrary.

Since they were not parties to either proceeding, appellees were not bound by the determination of the bankruptcy court or of the District Court for the Northern District of Florida. In any event, the determination in the first proceeding did not necessarily involve a decision as to the specific transfer to appellees involved in this suit,

and the determination in the second proceeding clearly did not.

The trial court did not assign the meaning and weight which the trustee does to the excerpt from Busby's testimony with which the trustee concludes his argument on this point in his opening brief, and in the entire context of the evidence the court was not compelled to do so. Moreover, Busby's purpose in transferring funds to himself through Jackson-Rogers did not necessarily taint his purpose (and hence the bankrupt's purpose) in transferring the funds used to repay the persons represented by appellees. Of course, Busby could not by his device avoid any liability to the trustee that might otherwise be his, but the trustee's right to recover from Busby was not involved in this proceeding.

2. *11 U. S.C.A. § 96 (a) (1).*

The trial court was justified in finding that Busby was not an agent of appellees (whose knowledge of the bankrupt's financial condition would be imputed to them), and that appellees had no actual or constructive notice of the possible insolvency of the bankrupt from any other source.

Both appellees testified that they had no knowledge of the possible insolvency of the bankrupt; and both Fletcher and Busby testified that they had not told appellees that the bankrupt corporation was insolvent. We find no evidence to support trustee's assertion that Rogers "obviously had full knowledge of the financial condition of the bankrupt Gulf at all times"; it is not supported by the fact that Rogers "had known Busby for quite some time," nor by

the fact that Rogers knew that the bankrupt needed additional funds to complete its preparatory work on the Panama City project.

Busby may be presumed to have had knowledge of the bankrupt's financial condition, but he as well as appellee testified that he was not part of the joint venture and did not act as appellees' agent for any purpose. If Haack's direct testimony appeared to be to the contrary, it was clarified on cross-examination. The fact that Busby was repaid from the $100,000 transferred to appellees indicated that appellees acted as Busby's agent for this purpose; it did not support the trustee's theory that Busby acted as appellees' agent. It is true that appellees transferred funds intended for the bankrupt corporation to Busby, but the trial court could conclude that this was adequately explained by Rogers' testimony that (from appellees' point of view) "Mr. Busby was Gulf Securities." Appellees' identification of Busby with the bankrupt corporation could also be accepted as a sufficient explanation of Rogers' testimony that he looked upon the money received in repayment "as Busby's money."

3 - *11 U.S.C.A. § 107 (d)(2)(a).*

Implicit in the trial court's findings is a determination that the trustee failed to establish that the transfer was made "without fair consideration." That determination is supported by the record, and is sufficient to bar recovery.

Though the evidence was in conflict, there was evidence from which the trial court could conclude that persons represented by appellees received $81,425 in return for an initial cash advance of $72,500, and that the difference

represented a payment of ten per cent on the principal and reimbursement of $2,675 in expenses. The trustee made no affirmative evidentiary showing that the excess of the transfer to appellees over the cash advance was more than fair consideration; instead he relied upon the contentions (a) that appellees were chargeable with sums paid to Busby, and (b) that in view of the October 19, 1956 agreement, any payment in excess of principal plus interest calculated at the New York prime rate necessarily exceeded fair consideration.

(a) On this record Busby's contribution and reimbursement were legally and factually separable from the contributions and reimbursement of persons represented by appellees, and might be excluded in determining whether the distribution of funds to the latter was supported by fair consideration. The trustee's settlement with Busby expressly covered the funds which Busby received in the transaction to which this suit relates; there is no apparent reason why the trustee should be permitted to hold both Busby and appellees responsible for receipt of the same funds.

(b) There was evidence that the bankrupt corporation, acting through Fletcher, breached its obligation under the October 19, 1956 contract to exert its best efforts to have the construction contracts awarded to Webb, and that the decision to increase the payment to appellees over the amount of interest provided for in the contract was based upon this breach. The trial court was free to conclude that because of the breach the corporation could not rely upon a contractual limitation of appellees' claim to compensation. Since the compensation received by the persons rep-

resented by appellees was thus not in excess of any binding contractual standard, and was neither self-evidently excessive nor shown to be excessive by affirmative proof, the court could have concluded that the trustee had failed to establish that it was more than fair consideration.

The judgment is affirmed.

The Court has concluded that the inclusion of the foregoing opinion in the published law reports would serve no public purpose. It therefore directs the Clerk that this opinion be not submitted for such publication.

(Endorsed) Opinion Filed March 5, 1963.

Frank H. Schmid, Clerk.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed: April 8, 1963

M. A. HOLAHAN, Trustee,
Appellant,

vs. No. 17,773

RUSSELL JACKSON and FRANCIS C. ROGERS,
Appellees.

UPON PETITION FOR REHEARING

Before: JERTBERG, MERRILL AND BROWNING, Circuit Judges

The opinion heretofore filed in the above matter is modified to substitute the figure "$1,675" for the figure "$2,675" appearing at the end of the third line from the bottom of page three, and the petition for rehearing is denied.

Gilbert H. Jertberg
Charles M. Merrill
James R. Browning
United States Circuit Judges

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

M. A. HOLLMAN, Trustee,
Appellant,

vs. No. 17,773

RUSSELL JACKSON and FRANCIS C. ROGERS
Appellees.

APPEAL from the United States District Court for the _____ District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the _____ District of Arizona and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered March 5, 1963.

No. 1086

In the Supreme Court of the United States

OCTOBER TERM, 1962

M. A. HOLAHAN, TRUSTEE, PETITIONER

v.

RUSSELL JACKSON and FRANCIS C. ROGERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE DEFENDANTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1086

M. A. HOLAHAN, TRUSTEE, PETITIONER

v.

RUSSELL JACKSON and FRANCIS C. ROGERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE DEFENDANTS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was not published, but a copy is appended as Appendix A to the Petition and the modification of the opinion is appended as Appendix B to the Petition.

JURISDICTION

The jurisdiction is correctly stated in the Petition for Certiorari.

STATEMENT

The bankrupt corporation, Gulf Securities of Louisiana, Inc., hereinafter referred to as "Gulf", entered into a contract with the City of Panama City, Florida on November 5, 1955, to perform certain services for the City in the sale of a $7,000,000 bond issue in connection with an improvement project. (Pltf.'s Exhibit 41, Tr. 277-278). Gulf was to receive a fee of eight per cent of the cash value of the bond issue, seven per cent or $490,000 upon the sale of the bonds, and one percent or $70,000 upon certain contingencies. The $70,000 payment is not involved in this litigation.

Under the terms of an agreement between defendants and Gulf (Exhibit 9, Tr. 70) defendants were to raise funds to be advanced to Gulf for use in carrying out Gulf's contract with the City, particularly in the sale of the bonds. This contract provided that in the event Del E. Webb Construction Company was not awarded the contract for the construction of the project, Gulf would refund all of such funds advanced, together with interest, and as security for the performance of this agreement Gulf on November 2, 1956, made an assignment of the agreement between Gulf and the City (Defendants' Exhibit A, Tr. 107).

On July 16, 1957, Gulf was paid the fee of $490,000 and on the same day delivered a cashier's check to defendants in the sum of $100,000 (Finding of Fact No. 3, Tr. 27). This $100,000 was refunded by the defendants to those who had advanced the money.

The Petition in Bankruptcy was filed July 16, 1957 and Gulf was adjudicated a bankrupt July 10, 1958 (Tr. 27).

The trustee in bankruptcy, the petitioner here, by his complaint sought to recover the $100,000 which the complaint alleges was received by defendants as an unlawful preferential payment from Gulf, an insolvent debtor.

ARGUMENT

The petition does not conform to the Rules of this Court (Rule 23). It is not a "concise statement of the case containing the facts material to the consideration of the questions presented", but is a lengthy argument on factual questions determined by the trial court and sustained by the Circuit Court of Appeals. They are not matters for review by this court and constitute no grounds for granting certiorari. The petitioner's argument has been answered by our briefs in the Circuit Court of Appeals and by the opinion handed down by that court. For us to enter into an extended argument on these issues at this time would serve no purpose except to violate the rules of this court.

REASONS FOR GRANTING WRIT

Under this heading Petitioner continues the argument on issues of fact, all of which were decided against him by the trial court and sustained by the Circuit Court of Appeals. The only attempt to state a reason why the Petition should be granted is contained in the "Conclusion" wherein the Petitioner states:

> "The questions presented all involve important questions of federal law, and particularly the rights of a trustee in bankruptcy. ————"

The Petition fails to state what important federal law or what rights of a trustee are involved.

There is nothing in the Findings of Fact (Tr. 27-34) or in the opinion of the Circuit Court of Appeals which furnish any grounds for review by the Supreme Court of the United States. Findings of Fact Nos. 14 and 15 (Tr. 31) are by themselves sufficient to justify the decision of the Circuit Court of Appeals. The court found that there was no fraud, actual or constructive, in the payment of the $100,000 and that at the time of the payment the defendants had no knowledge that Gulf was insolvent "nor did either of said defendants have any knowledge, information or suspicion that would place them, or either of them, on notice that the Gulf Securities of Louisiana, Inc. was insolvent or that any person whomsoever claimed that said company was insolvent."

This court has said that certiorari is granted for two purposes. First, to secure uniformity of decisions between the Circuit Courts and, second, to bring up questions of importance which it is in the public interest to have decided by the court of last resort.

> *Magnum Import Company, Petitioner* vs. *Coty*, 262 U. S. 922; 43 Supreme Court 531, 532; 67 L.Ed. 922

Neither of the purposes are present in this case.

CONCLUSION

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

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AFFIDAVIT OF SERVICE

STATE OF ARIZONA }
County of Maricopa } ss.

FRANK E. FLYNN, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the respondents in the Brief in Opposition and that he has caused to be served copies of the foregoing Brief in Opposition on Paul J. Thriffiley, Jr., attorney for Petitioner, by depositing the same in the United States Post Office at Phoenix, Arizona, with first-class air mail postage prepaid, addressed to said Paul J. Thriffiley, Jr., counsel of record for petitioner, at 717 Richards Building, New Orleans 12, Louisiana.

.....

SUBSCRIBED and SWORN to before me this ..... day of May, 1963.

.....
Notary Public

My commission expires:

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